Filed 12/28/09 P. v. Young CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JESSE MOE YOUNG, Defendant and Appellant.	C058390 (Super. Ct. No. 07F00400)

A jury found defendant Jesse Moe Young murdered Donald Desaix with a knife while lying in wait. The court found he had five prior strikes and sentenced him to prison for life without the possibility of parole plus one year.

On appeal, defendant raises the following four contentions: (1) the court abused its discretion in admitting evidence of an elevator incident that took place prior to the murder; (2) the court abused its discretion in admitting a statement he made prior to the murder in which he said he had been to prison; (3) there was insufficient evidence his 1995 conviction was a strike; and (4) there was insufficient evidence his 1966

conviction was a strike. We agree with only the last contention and modify the judgment accordingly.

FACTUAL AND PROCEDURAL HISTORY

A

Facts Of The Crime

Park Place is a high rise apartment complex for senior citizens. Residents eat together in a common dining area according to an assigned seating arrangement. Dinner is served in two seatings, one at 4:00 p.m. and the other at 5:15 p.m.

In January 2007, Desaix lived at Park Place in room 222. He ate dinner at 5:15 p.m., as did another resident, Julius Bertrand. Defendant lived at Park Place in room 1009. He ate dinner at 4:00 p.m.

On January 11, 2007, Desaix was having dinner in the dining area. He sat adjacent to a table where Bertrand was sitting with another resident, Arthur. Defendant, whom Bertrand described as "verbose," approached Bertrand's table and began joking around with Arthur, who was not paying attention to him. Defendant turned and walked toward the back of the dining room, still joking with Arthur. As he did, Desaix stood up and said, "'We've had enough of this. We don't have to take this any further.'" "'You don't belong in here.'" "'Why don't you get out and leave us alone?'" Defendant left and Desaix sat down and finished his meal.

Sometime after 6:00 p.m. that evening, Jai Sharma, the night porter and janitor, received word from another resident, Haskell Richter, who lived in room 223, that there was a fight

going on next door. Sharma went to room 222. The door was closed but he could hear someone moaning inside. He later told police he heard two voices arguing. Sharma knocked and then pushed the door open. Desaix was sitting on the floor, bleeding, with one hand on the doorknob and one hand on his chest. When Sharma asked what was going on, Desaix said, "I got stabbed." Defendant, who was also in the apartment, ran out the door. The door closed, and Sharma went to the office and called 911. Defendant went to his apartment, where he dropped a pair of bloody gloves on the floor. He then went downstairs and outside for a walk.

When police arrived, they found Desaix sitting up against the door of the apartment with blood on his clothes and a broken knife blade in his chest. The knife handle was lying on the floor near his body. A forensic pathologist later determined Desaix suffered stab wounds to his face, neck, hand and chest, and that he died as a result of a stab wound to the chest that penetrated his abdomen.

At approximately 6:30 p.m., police found defendant standing on a street corner one block from Park Place. There were red stains on his clothing. He smelled of alcohol and was carrying a water bottle containing alcohol.

After his arrest, defendant told police he was fed up with and tired of Desaix and his "mind was made up" that he "was gonna put him [Desaix] to sleep," meaning he wanted to kill Desaix and leave no witnesses. Following the incident at dinner, he went to his room on the 10th floor, got a butcher

knife and went down to the lobby to wait for Desaix to return from the dining room. When Desaix opened the door to his apartment, defendant slipped in behind him. Defendant stabbed Desaix several times and, when the knife broke, he threw the handle on the floor. He "knew it was all over" when Sharma opened the door, and he said to himself, "[F]uck it, man. I'm just gonna go downstairs." He went to his apartment where he dropped bloody gloves on the floor. He went downstairs, walked around the block "to get some air," and was "headed for the light rail" when police apprehended him.

B

Additional Background Facts

Robert Smith, a resident of Park Place, testified that earlier in the day on January 11, 2007, he and two friends, Phillip Hanna and Donna Hebert, were in the elevator going to Hebert's doctor's appointment. Smith did not remember what time the encounter occurred. Hanna recalled the incident occurred sometime that morning. Hebert recalled the incident occurred at 1:00 p.m. or 2:00 p.m. that day.

The elevator stopped on the 10th floor and the doors opened. Defendant stood waiting with his bicycle. His eyes were bloodshot and his speech abnormal, and it appeared to Smith defendant was intoxicated. Hanna and Hebert also thought defendant had been drinking. Smith and the others invited defendant to come in but he declined, telling them he would catch the next one. The elevator doors closed, but because no one pushed the button, the doors reopened on the same floor.

Defendant was agitated and a little angry. Hanna recalled him saying something to the effect of, "'You guys are doing this on purpose. Go on and let me get on there.'" Hebert became fearful of defendant and backed into the corner of the elevator. When the elevator doors opened a third time, defendant was "extremely upset." His voice was loud and he became belligerent, angry, and intimidating. The elevator doors closed again and Smith and the others finally reached the basement where they got into Smith's truck to leave. Within minutes, defendant approached the truck with his bicycle and apologized to Smith for his earlier behavior.

Bertrand testified that, a week prior to the murder, defendant was speaking very loudly in the dining room and Desaix told defendant to shut up and get out of the dining hall.

Hebert testified that, several weeks prior to the murder, there had been a verbal exchange between defendant and Desaix, wherein defendant entered the dining room and Desaix told him to "get out of the room, that he didn't belong there at that hour." Defendant turned and walked out.

Hanna testified that, several months prior to the murder, defendant came into the dining area and was being loud and belligerent. Desaix said, "'Sit down'" or "'Be quiet'" or something to that effect.

James Gomez, a former resident of Park Place, testified that several weeks prior to the murder, he was sitting outside the apartment complex having coffee, when defendant began talking "real loud" on his cell phone. Desaix, who was also

sitting outside, said something to the effect of, "'Why the fuck you talking so loud?'" "'Shut up.'" "'Shut the fuck up.'" Gomez later told police that after Desaix left defendant said, "'I am going to get him. I am going to get him. I know where he lives, and he doesn't know that I know where he lives. That motherfucker, I am going it get [*sic*] that motherfucker. I've been to prison. I don't give a fuck. I am going to it get [*sic*] that motherfucker." Gomez also told police defendant said, "'The reason nothing happened in the dining room, because there's too many witnesses.'"

Gomez also testified that he witnessed the verbal exchange between defendant and Desaix several weeks prior to the murder, wherein defendant and Desaix had an argument because defendant was in the dining room after his appointed time. Gomez told police that Desaix told defendant, "'Get the fuck out of here. You don't belong here. This ain't your time. Get the fuck out.'"

DISCUSSION

I

The Court Did Not Err In Admitting Evidence Of The Elevator Incident

Defendant contends the court abused its discretion in admitting testimony regarding the elevator incident because it was inadmissible character and propensity evidence under Evidence Code section 1101. He is wrong.

Although that code section makes inadmissible evidence of a person's character or character trait used to prove his conduct

on a specific occasion (Evid. Code, § 1101, subd. (a)), it allows admission of evidence of a prior crime or other act "when relevant to prove some fact . . . other than his or her disposition to commit" the current crime (Evid. Code, § 1101, subd. (b)).

Here, the evidence of defendant's behavior hours before he killed Desaix was relevant to show defendant's state of mind and therefore negates the defense that the killing was voluntary manslaughter as a result of ongoing provocation by Desaix. According to defendant's closing argument, Desaix's behavior toward defendant consisted of repeatedly hostile incidents over weeks that provoked him to kill Desaix. Defendant's behavior in the elevator -- that took place hours before the murder and involved three people other than Desaix -- tended to show a hostile, belligerent, angry state of mind that had nothing to do with Desaix. Specifically, when the elevator door mistakenly opened three times, defendant yelled, accused the other riders (none of whom were Desaix) of "doing this on purpose," causing at least one of the riders to become fearful of defendant. This evidence was admissible to show defendant's state of mind on the day of the murder that was separate from anything Desaix had done, which negated his theory he acted rashly and emotionally because of Desaix's ongoing provocation of him.

Nor was this evidence unduly prejudicial. Although it was damaging to the defense, it was not the type of evidence that would have provoked an emotional bias against him. (See *People v. Karis* (1988) 46 Cal.3d 612, 638.) In straightforward terms,

it was simply evidence that defendant had acted angrily and arguably disproportionately when an elevator door had improperly opened three times. Compared to defendant's current acts, this was nothing. Defendant's abuse of discretion argument fails.

II

The Court Did Not Err In Admitting Evidence Of Defendant's Prior Statement That He Had Been To Prison

Defendant contends the court abused its discretion in admitting his statement he had "been to prison" because it was cumulative and would "inflame the emotions of the jury." He is wrong.

The statement was not cumulative because it strengthened defendant's threat to "get [Desaix]" by demonstrating that defendant knew the consequences of killing Desaix, i.e., that he would go to prison, but he did not care. There was nothing particularly inflammatory about the statement, especially given the gruesome state of the evidence. The jury had heard evidence defendant planned to kill Desaix with a knife, waited for him to enter the apartment and then sneaked in behind him, and stabbed him all over his body with such force that the knife blade broke in his chest. Against this evidence, the simple statement by defendant that he had been to prison was not unduly prejudicial. There was no error.

III

There Was Sufficient Evidence Defendant's

1995 Prior Conviction Was A Strike

Defendant contends the evidence was insufficient to prove his 1995 conviction was a strike. He argues the abstract of judgment from his 1995 conviction reflects he was convicted of "involuntary manslaughter," and that crime is not a strike. Defendant's argument fails.

The abstract states that defendant was convicted of "involuntary manslaughter" pursuant to Penal Code[1] section "192(a)," for which he received the upper term sentence of 11 years in prison.

The trial court found that defendant was convicted instead of voluntary manslaughter (§ 192, subd. (a)), a serious felony within the meaning of section 1192.7, subdivision (c). Substantial evidence supports that conclusion. The abstract references the code section defining voluntary manslaughter and reflects an upper term sentence of 11 years, which is proper for voluntary manslaughter (§ 193, subd. (a)), but not for involuntary manslaughter (§ 193, subd. (b)). In the absence of rebuttal evidence, it was reasonable for the court to infer from the record that the reference to "involuntary manslaughter" in the abstract was a clerical error and the section and sentencing

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[1] All further section references are to the Penal Code.

references were accurate. On this record, defendant's argument fails.

IV

There Was Insufficient Evidence Defendant's 1966 Prior Conviction Was A Strike

Defendant contends, and the People concede, there was insufficient evidence to prove his 1966 conviction was a strike. We agree.

Defendant was convicted in 1966 of assault on a peace officer in violation of former section 241. Former section 241 describes simple assault on a peace officer. (Stats. 1965, ch. 1553, § 1, p. 3646.) Under the three strikes law, however, only an assault on a peace officer *in violation of section 245* is a strike. (§ 1192.7, subd. (c)(31).) Section 245 criminalizes an assault on a peace officer with a firearm (§ 245, subd. (d)(1)), semiautomatic firearm (§ 245, subd. (d)(2)), machinegun (§ 245, subd. (d)(3)), or "with a deadly weapon or instrument, other than a firearm, or by any means likely to produce great bodily injury" (§ 245, subd. (c)). There was no evidence here the conviction involved any of these weapons. Under these facts, the court's finding the 1966 conviction was a strike was wrong.

DISPOSITION

The finding that defendant's 1966 conviction was a strike is reversed. As modified, the judgment is affirmed.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.